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(6) DOES BREWER versus WILLIAMS END POLICE INTERROGATION?

(10) Saundra T. Brewer

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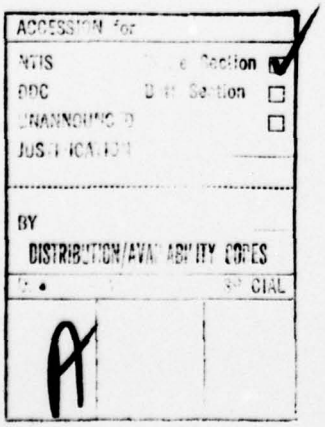
ABSTRACT

Analyzes the 1977 United States Supreme Court ruling in *Brewer v. Williams*, a case that was expected to be the vehicle for overturning or limiting *Miranda v. Arizona*. The author reviews the history of major Supreme Court decisions involving the right to and the waiver of counsel and argues both that *Brewer* was erroneously decided on right to counsel grounds and that *Brewer* will unduly restrict police investigation. The exclusionary rule is aimed at preventing wrongfully acquired evidence from being introduced at trial. Its effect is to deter proscribed police conduct and ensure an individual's constitutional privileges and guarantees. Application of this rule creates a conflict between two fundamental societal interests: the need to safeguard individual rights from unconstitutional methods of law enforcement, and the need for prompt and effective investigation of unsolved crimes. The author argues that while the exclusionary rule is designed to proscribe coercive police tactics in eliciting criminal confessions and admissions, it should not be read so broadly as to preclude the police from questioning an individual who has waived his rights. The majority in *Brewer* ignored facts demonstrating Williams' voluntary waiver of counsel before he elected to speak with police officers. The Court's holding will deter police from questioning a suspect and will exclude voluntary statements made by a defendant in the absence of counsel. The author concludes that *Brewer* unwisely tilts the balance between individual freedom from police interrogation and society's need for criminal investigation.



BREWER v. WILLIAMS: THE END OF POST-CHARGING INTERROGATION?*

by

Saundra T. Brewer

In March of 1977, the United States Supreme Court decided *Brewer v. Williams*,[1] a case that many observers[2] had hoped would re-evaluate the scope of the landmark 1966 *Miranda v. Arizona* decision.[3] The Court declined to reconsider *Miranda*.[4] Instead, the decision was based solely upon the constitutional right to assistance of counsel.[5] *Brewer* involved a defendant who had been convicted of first degree murder. The question before the Supreme Court was whether the defendant, who had the legal right to refrain from making any statements to the police without the presence of counsel, had validly waived that protection by consenting to disclose the location of the victim's body. In a five-to-four decision,[6] the Court held that after judicial proceedings have been initiated, the sixth amendment prohibits police from eliciting information from a defendant absent a knowing and intentional relinquishment of his right to counsel.

In deciding a broad and controversial question of constitutional law, the Court ignored a narrower ground of decision[7] that would have compelled a contrary result. It was undisputed that Williams had been fully apprised of his constitutional rights[8] and that no coercive tactics were employed by the police. Thus, his statements clearly were voluntary.[9] Employment of a standard emphasizing the "voluntariness" of the statement, rather than the express relinquishment of rights, would have resulted, therefore, in a finding of a valid waiver.

This note will suggest that the majority circumvented the issue of whether the defendant's statements were volunteered; that the Court's discussion of the "constitutional waiver standard" was unclear; and that the Court's rigid application of *Massiah v. United States*,[10] a case in which the controlling facts were strikingly different, was misplaced.

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FACTS

Robert Anthony Williams kidnapped and murdered a ten year old girl in Des Moines, Iowa, on Christmas Eve, 1968. Suspicion quickly focused on Williams following the girl's disappearance,[11] and the next day his car was found in Davenport, Iowa, approximately 160 miles east of Des Moines. A warrant for his arrest on a charge of abduction was issued in Des Moines. On December 26, after telephone consultation with a Des Moines attorney, Williams surrendered to the Davenport police and was promptly arraigned. The Des Moines lawyer, as well as an attorney in Davenport, advised him not to discuss the case with the police. Moreover, while in Davenport, the court and the police informed him of his rights under *Miranda*. Meanwhile, two Des Moines police detectives, after agreeing not to question the defendant during the trip, were dispatched to Davenport to take custody of the defendant and to return him to Des Moines by car. The Davenport attorney was denied permission to accompany Williams during the trip. Shortly after the two detectives and Williams set out for Des Moines, Williams "initiated a conversation"[12] with Captain Leaming, who was sitting in the back seat of the police car with him. The wide-ranging conversation covered a variety of topics, including religion and police procedures.[13] Williams asked questions about the missing child.[14] They were not very far out of Davenport when Captain Leaming told Williams that he should consider the natural concern of the abducted girl's family that their daughter receive a proper Christian burial.[15] Williams made no response. Approximately two hours later, Williams asked if the police had found the victim's shoes. When Captain Leaming replied that he did not know, Williams directed the officers to a service station where he said he had left the shoes. A search for them there, however, was unsuccessful. Later Williams inquired if the blanket had been recovered. Again, a search of the area to which Williams directed them was not fruitful. Shortly thereafter, Williams stated, "I am going to show you where the body is,"[16] and directed the detectives to the body of the young girl. This statement was admitted into evidence at his trial. He was convicted of

first-degree murder.

The state courts held that Williams' statement constituted a waiver of his sixth amendment rights; the Supreme Court disagreed.

PRECURSORS TO *BREWER* IN RECENT CONSTITUTIONAL LAW

The Right to Counsel

The Supreme Court long has recognized the requirement that an accused be represented by counsel in a criminal proceeding. In 1932, in *Powell v. Alabama*,[17] the defendants were tried without the benefit of counsel. The jury trial resulted in convictions, with the death penalty imposed on all defendants. The Supreme Court reversed the convictions on the ground that the defendants had not been accorded their constitutional right to counsel.[18] The key principle set forth in *Powell* was the explicit requirement that a person accused of a crime receive assistance of counsel in all cases that could result in a death sentence. The Court certainly did not rule, in *Powell*, that defendants in *all* criminal trials under state jurisdictions were entitled to be represented by counsel; it merely held that defendants in state courts must be treated fairly.[19] Although the Court stated that fairness in capital cases clearly required providing counsel to the accused, the decision did not oblige the states to provide a defendant with counsel in lesser criminal cases.

This highly qualified holding was reaffirmed in 1942 when the Court ruled, in *Betts v. Brady*,[20] that an accused's right to counsel was applicable only to federal court proceedings and not to defendants in state courts. The protection afforded by the sixth amendment was amplified in *Johnson v. Zerbst*,[21] wherein the Court held that the sixth amendment applies to all defendants in federal courts. *Johnson* concluded that every defendant in federal court must be represented by an attorney at trial unless, with full prior knowledge of his right to counsel, the defendant makes a competent and intelligent waiver of that right.[22]

The major breakthrough for defendants in state courts did not come

until 1963, when the Supreme Court, in *Gideon v. Wainwright*,[23] overruled not only *Betts* but every decision which had held that states were not required to provide counsel for criminal defendants. Gideon had petitioned to the Supreme Court, where he claimed that his trial without assistance of counsel had constituted a violation of his fundamental rights guaranteed by the United States Constitution and the Bill of Rights. A unanimous Court concurred.[24]

Once the right to counsel had been expanded by *Gideon* to include defendants in state courts, the Supreme Court then sought to determine that point in the course of a criminal proceeding at which this right would attach. *Powell* was invoked in *Massiah v. United States*,[25] in which the Court noted:

> [D]uring perhaps the most critical period of the proceedings . . . that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation, and preparation [are] vitally important, the defendants . . . [are] as much entitled to such aid [of counsel] during that period as at the trial itself.[26]

By ruling that Massiah had been denied the fundamental constitutional protection of counsel,[27] the Court applied the sixth amendment to "critical periods" in criminal proceedings.

Shortly after *Massiah*, the Court decided *Escobedo v. Illinois*.[28] *Escobedo* expanded the principle enunciated in *Gideon* and extended the right to counsel to all situations in which certain specified conditions were met.[29] In *Escobedo*, statements obtained from the accused in the absence of counsel were admitted into evidence over his objection, resulting in his conviction for murder. The Supreme Court reversed his conviction, holding that when a person is in custody and suspicion has *focused* on him, he has a right to have counsel present during interrogation.[30]

Confusion was generated by diverse interpretations of *focus* and the *Escobedo* guidelines. The Supreme Court, therefore, sought to delineate the requirements of the fifth and sixth amendments in *Miranda v. Arizona*.[31] In *Miranda*, the police did not effectively

advise the defendant of his fifth and sixth amendment rights at the outset of his interrogation. Miranda had retained an attorney who was present at the station during the interrogation. The defendant's request to speak with him, however, was denied. Miranda was interrogated for four hours, while standing handcuffed in a special interrogation room. The Court held that, under these conditions, his confession was constitutionally inadmissible and, accordingly, reversed the conviction of the Arizona Supreme Court. Thus, *Miranda* increased the severity and specificity of *Escobedo*.[32]

The element of *focus*, which had been so crucial to the guidelines formulated by *Escobedo*, was completely eliminated in *Miranda*.[33] In its place, the Court substituted "custodial interrogation."[34] The Court reasoned that when the conditions of custody and interrogation occur, an accused's privilege against self-incrimination is jeopardized.[35] In order to safeguard this privilege, *Miranda* delineated a system of required warnings to be employed whenever a suspect might be subjected to custodial interrogation.[36]

Miranda sought to protect an individual's fifth amendment privilege against self-incrimination.[37] Since the Court recognized that an accused more easily could understand the warnings given him and more intelligently could act upon them if he had counsel to assist him, *Miranda* initially appeared to address both the privilege against self-incrimination *and* the right to counsel.[38] Confusion arose, however, over the precise nature of the right to counsel which the Court had intended in articulating the *Miranda* admonishment. The Court, in later decisions, interpreted *Miranda* as grounded only upon the fifth amendment.[39]

In *Kirby v. Illinois*,[40] the Court indicated that *Miranda* was based exclusively upon the fifth amendment privilege against compulsory self-incrimination. The Court in *Kirby* reasoned that custodial interrogation is inherently coercive[41] and, accordingly, safeguards must be employed to insure that an accused is given the full protection of the fifth amendment. Thus, the *Miranda* admonition regarding counsel is intended solely to help an accused understand and evaluate his right to remain silent.

In addition to clarifying the protection guaranteed by *Miranda*, *Kirby* expressly reiterated that the sixth amendment right to counsel attaches only at or after the initiation of judicial proceedings.[42] In its holding, the Court referred to two 1967 cases in which the circumstances were different than in *Kirby*, and which had found that a lineup had constituted a "critical stage" in a criminal prosecution.[43] The Court emphasized that "[i]t is this point, therefore, [initiation of judicial criminal proceedings] that marks the commencement of the criminal prosecutions to which alone the explicit guarantees of the sixth amendment are applicable."[44]

United States v. Durham,[45] decided after *Kirby*, concerned the admissibility of a purported confession. The issue posed was "whether *Massiah* is limited to post-indictment statements or whether it includes statements obtained after arrest and preliminary hearing."[46] The Court concluded that governmental officials ordinarily should not communicate with a represented defendant without first notifying his attorney.[47]

The Right to Waive Counsel

Under the common law an accused could not waive any right intended for his protection.[48] Modern courts, however, have held that a defendant may waive both his privilege against self-incrimination and his right to the assistance of counsel.[49] *Johnson v. Zerbst*[50] held that an effective waiver must be evidenced by an intentional relinquishment or abandonment of a known right or privilege.[51] Whether an accused effectively has waived his right to counsel largely depends upon the facts and circumstances of the particular case.[52] Among the probative factors to be considered are the age and intelligence of the accused, his conduct and the conduct of the police at the time of the waiver, and whether the accused has been given and understands his constitutional rights.

In addition to an *express* waiver, a valid *implied* waiver may occur when a defendant, after being advised, makes a statement without invoking his right to counsel.[53] In *Moore v. Wolff*,[54] police interrogation was conducted without notifying the defendant's appointed

counsel. The court found that there was no express waiver by the defendant; he merely orally admitted his involvement in the crime after being apprised of his constitutional rights.[55] The court, concluding that "*Massiah* should not be read so broadly as to hold that there may never be a valid waiver after indictment or arraignment,"[56] ruled that the defendant's reliance upon *Massiah* was "misplaced" and upheld his conviction on the ground that he had made a knowing and voluntary waiver.[57]

More recently, a federal appellate court found that the evidence was sufficient to support a finding of an intelligent and voluntary waiver when (1) the defendant acknowledged that he fully understood the *Miranda* warnings, (2) the defendant told the agent that he was willing to answer questions but would decline to sign the waiver form, and (3) the defendant answered the questions asked of him.[58] The court relied upon *Moore*, stating: "A voluntary waiver . . . may be made orally by replying to questions as in this case."[59]

Voluntariness generally is considered to be an issue inherent in an analysis of waiver.[60] The courts which reviewed *Brewer* all relied upon the *Johnson* guidelines for determining waiver. The Iowa state courts focused upon the totality-of-circumstances aspect of the doctrine, while the federal courts strictly adhered to the requirement of an intentional relinquishment of a known right or privilege. This divergence predictably resulted in contradictory conclusions.

AMBIGUITIES AND OVERSIGHTS IN THE COURT RULING ON *BREWER*

The Elusive Criteria for Establishing Waiver

The threshold requirement for a valid waiver of a right is *knowledge* of that right.[61] It is clear that Williams was informed of his rights. He was given full *Miranda* warnings on three separate occasions[62] and additionally was advised by two different attorneys to refrain from speaking to the authorities.[63] Williams' comprehension of these warnings was demonstrated when he asked to have counsel present on several occasions during the day of his arrest.[64] Furthermore, he

expressly stated that he understood his rights.[65]

The second consideration in determining a valid waiver is the defendant's ability to make an *intelligent* decision whether to avail himself of the right involved.[66] Since it was not alleged that Williams suffered from any mental disability, it may be assumed that he was physically healthy, alert and capable of understanding and exercising his constitutional rights. At no time did Williams deny that he understood the warnings given him.[67] Moreover, the fact that he consulted with an attorney *before* surrendering to the police and requested conferences with a second attorney *after* being arrested strongly supports the inference that he was fully aware of what he was doing.

The finding of *voluntariness*, the third prerequisite of a valid waiver, involves a more subjective determination than the other requirements.[68] The obvious difficulty in making such a determination, however, does not justify excluding voluntariness as a constitutional requisite. Whether a defendant's statements are "voluntary" or are the product of coercive police tactics is a question to be determined after "the Court has assessed the totality of all the surrounding circumstances."[69] It was not alleged that Williams was subjected to any form of physical abuse or coercion. No force or threat of force was employed to persuade him to talk. Indeed, Williams' initiation of conversations concerning the crime during the trip back to Des Moines[70] indicates that he was willing, and even eager, to talk freely with the police, even though he knew he could remain silent. When an accused actively seeks to speak with officials about matters under criminal investigation, it can indicate an intention to waive his rights:[71]

> Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. The fundamental import of the privilege [against self-incrimination] while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated.[72]

The federal courts reviewing *Brewer* determined that Captain Leaming's "Christian burial" statement was tantamount to "interrogation." Apparently these courts reasoned that interrogation induces an answer; Williams' disclosure of the body's location two hours later was interpreted as a response to Leaming's statement. Thus, the statement was deemed to be interrogation.[73] There are two flaws in this reasoning. First, it is an unsupported expansion of the concept of interrogation. *Escobedo*, *Miranda*, and their progeny all have limited interrogation to examination by asking questions.[74] Secondly, no one does anything free from prior influences; there are no uncaused actions. The passage of two hours between Leaming's statement and Williams' disclosure illustrates the remoteness of the antecedent influence. But, assuming that the Christian burial remarks had an influence, it was because of Williams' entire upbringing--an interlocking composite of social, ethical and moral forces that combine to make Williams the person he is.

Miranda and the Issue of Voluntariness

Miranda states, "The warnings required and the waiver necessary . . . are, *in the absence of a fully effective equivalent*, prerequisites to the admissibility of any statement made by a defendant."[75] The majority in *Miranda* thus explicitly acknowledged that convincing circumstances can provide a substitute for an express waiver. This proposition is based upon the premise that the circumstances of a particular situation may amount to an implicit waiver. In making such a determination, courts primarily focus upon the sufficiency of the warnings given, the individual's knowledge of his rights, and the voluntariness of the statements.[76]

The *Miranda* waiver requirements are flexible. After a charged suspect has been read the *Miranda* warnings and has acknowledged his understanding of them, several options are available. He may invoke his right to consult with and have counsel present. Alternatively, he may decide to waive his rights to silence and counsel and respond to officers' questions. Such a waiver may be made after discussing

the matter with an attorney. *Miranda*, however, does not *require* the accused to consult with an attorney before deciding to waive his rights. He may make a valid waiver immediately after receiving the warning, or later without advice from counsel.[77]

The Iowa state courts, after examining the facts of the case, found that Williams' incriminating statements were given voluntarily and thus were admissible.[78] The federal courts in *Brewer*, however, avoided the issue of voluntariness and uniformly concluded that an incorrect constitutional standard had been applied by the state courts in resolving the issue of waiver.[79] In the federal habeas corpus proceeding, the district court held that the issue of waiver was not one of fact but of federal law and that the state courts had "applied the wrong constitutional standards in making that finding [that Williams had waived his constitutional rights]."[80] Moreover, the district court concluded "that [Williams] *could not* effectively waive his right to counsel for purposes of interrogation in the absence of counsel (or at least notice to his counsel of the interrogation)."[81]

While its opinion was couched in more moderate language, the federal court of appeals upheld the reasoning of the district court.[82] In evaluating the rulings of both lower federal courts on the issue of waiver, the Supreme Court concluded, "The District Court and the Court of Appeals were correct in the view that the question of waiver was not a question of . . . fact, but one which . . . requires 'application of constitutional principles.'"[83]

If the Court in *Brewer* had applied the *Johnson* "totality-of-circumstances test and *Miranda* guidelines to determine the issue of waiver, its holding might have been different. *Miranda* expressly acknowledged that a person who has been apprised of his rights may effectively waive those rights if the waiver is executed voluntarily, knowingly and intelligently.[84] The state bears the burden of demonstrating that an accused has knowingly and intelligently relinquished his rights.[85] Since *Miranda* does not require any particular words to be uttered by a defendant, the totality of circumstances must be scrutinized by a court determining the validity of a waiver.

The conduct of Williams which, under *Miranda*, could have constituted a valid waiver, was held *not* to indicate a waiver. Although Williams did not actually utter the words "I waive my rights" prior to saying that he would show the officers the body, his actions clearly demonstrated a waiver. Even in the face of an explicit statement, such as "I am fully aware of the rights and admonitions that were given me, and having said that, I'm now going to show you where the body is," it is doubtful that the Court would have found a waiver. If the Court *could* have been persuaded that a valid waiver had occurred in this hypothetical situation, then one could ask what would constitute the essential difference between that hypothetical situation and the actual facts in *Brewer*.[86]

In *Brewer*, the Court expressed a preference for excluding post-charging interrogation despite indicia of voluntariness. The effect, implicit in the Court's holding, appears to be that counsel must be present if a defendant is to effectively waive his right to counsel. The presence of counsel would signal the end of post-charging interrogation. No competent defense attorney would permit interrogation after the defendant has been charged.

This decision, shifting the balance in favor of the defendant, will make it harder to convict criminal defendants. It conceivably could discourage dependence upon defendants' statements for evidence and exert pressure on law enforcement agencies to investigate and obtain independent evidence. There may even be a faint echo of receptivity to a defendant's pre-charging statements.

Misplaced Reliance on the *Massiah* Precedent

The Court in *Brewer* deemed the central question to be the sixth amendment right to counsel. After it concluded that the defendant's constitutional right to counsel had been abridged, the Court chose a tortuous path when it relied upon the authority of *Massiah* to defend that conclusion. The palpable lack of congruity between the cases makes reliance upon *Massiah* questionable.

In *Massiah*, the defendant had been indicted for violating federal

narcotics laws. He retained a lawyer, pleaded not guilty, and was released on bail. While free on bail, he made incriminating statements to a co-defendant, who, unknown to him, had become a police agent. The co-defendant had placed a hidden radio transmitter on the car and Massiah's statements were broadcast to another agent. The Court held that Massiah had been denied the fundamental constitutional protection of counsel.[87]

The *Brewer* majority concluded that "[i]t thus requires no wooden or technical application of the *Massiah* doctrine to conclude that Williams was entitled to the assistance of counsel guaranteed to him by the Sixth and Fourteenth Amendments."[88] Given the circumstances in *Brewer*, unqualified reliance upon the *Massiah* doctrine was misplaced. *Massiah* was couched in strong language because the circumstances of the case mandated it.[90] The facts of *Brewer*, however, were diametrically opposed,[91] a consideration the Court summarily dismissed as "irrelevant."[92] The Court in *Brewer* reasoned that the right to counsel was the primary issue in both cases; because this issue entailed a fundamental constitutional right, the cases were therefore "constitutionally indistinguishable." Thus, *Massiah* was determinative.[93] The asserted basis for this identity of circumstances was that law enforcement agents in *Massiah* had deliberately elicited incriminating statements from the arraigned defendant in the absence of his counsel, elements present in *Brewer*. The Court ignored the dissimilarities between the two cases. Notwithstanding the fact that it referred to "significant factual difference[s] between the present case [*Brewer*] and *Massiah*,"[94] the Court continued, "This circumstance plainly provides the state with no argument for distinguishing away the protection afforded by *Massiah*."[95]

The *Brewer* ruling, expressly anchored on *Massiah* grounds, unqualifiedly adopted its holding despite a clear warning given by Justice White in *Massiah:*

> It is therefore a rather portentous occasion when a constitutional rule is established barring the use of evidence which is relevant, reliable, and highly

> probative of the issue which the trial court has before it--whether the accused committed the act with which he is charged. Without the evidence, the quest for truth may be seriously impeded and in many cases the trial court, although aware of proof showing defendant's guilt, must nevertheless release him because the crucial evidence is deemed inadmissible. . . . [T]he soundest of reasons is necessary to warrant the exclusion of evidence otherwise admissible.
>
> . . . The importance of the matter should not be underestimated, for *today's rule promises to have wide application well beyond the facts of this case*.[96]

It may be concluded from *Brewer* that a court, by circumventing the *Miranda* issue and basing its ruling solely upon *Massiah*, may avoid finding a waiver after judicial proceedings have commenced against an individual whose counsel is not present.[97] *Massiah* does not address the issue of waiver at all.[98] This hardly seems unreasonable since Massiah was not able to make an informed decision regarding his right to counsel. It is *not* reasonable, however, to preclude waiver when a defendant *does* have that choice and *does* know he is talking to a governmental agent. Indiscriminate insistence that any case involving the right to counsel abide by the exacting standards of *Massiah* is arbitrary and unjustifiable.

Other Problems and Prospects

The Supreme Court is the ultimate authority in defining the scope of the exclusionary rule. This rule is aimed at preventing wrongfully acquired evidence from being introduced at trial. Its effect is to deter proscribed police conduct and ensure an individual's constitutional privileges and guarantees. Application of the exclusionary rule creates a conflict between two fundamental societal interests: the need to safeguard individual rights from being abridged by unconstitutional methods of law enforcement, and the need for prompt and effective investigation of unsolved crimes.

Chief Justice Burger in *Brewer* asserted that "[r]elevant factors in this case are . . . indistinguishable from those in [*Stone v. Powell*],

and from those in other Fourth Amendment cases suggesting a balancing approach toward utilization of the exclusionary sanction."[99] *Stone*, according to the Chief Justice, was "premised on the utter reliability of evidence sought to be suppressed."[100]

While *Stone* focused upon fourth amendment claims, Justice Powell, author of the *Stone* opinion, acknowledged in *Brewer* that the *Stone* rationale might be applied to fifth and sixth amendment claims as well.[101] Since there was no coercive police conduct in *Brewer*, and since Williams' disclosure was unquestionably reliable, *Brewer* was sufficiently analogous to *Stone* to have that rationale apply.

Factual determinations of a state court are presumed correct by a federal court reviewing a state conviction on a writ of habeas corpus.[102] Legal conclusions, however, are reviewable *de novo* by a federal court and are issues "upon which a federal court must always make an independent determination."[103] Both the federal district court and the court of appeals in *Brewer* determined that the issue of waiver was a question of federal law and held that the Iowa state courts had applied the wrong constitutional standards in analyzing the case. The federal courts, however, disregarded statutory strictures when they made "some additional findings *of fact* based upon . . . examination of the state court record."[104] This approach implies that federal courts, when reviewing a state conviction, may give superficial treatment to state court findings of fact.[105]

The majority in *Brewer* placed great weight upon the alleged broken agreement between the police and attorney McKnight that Williams was not to be questioned until he returned to Des Moines.[106] This factor, however, should not have been determinative on the waiver issue at all. Constitutional rights are *personal*, and their waiver depends upon the actions and attitudes of the individual possessing those rights, and not upon the conduct of another.[107]

The majority also relied heavily upon remarks made by Williams during the car trip indicating that he would tell the police the whole story when he got to Des Moines. While these statements *might* indicate that he was invoking his rights, they would not have precluded

him from later changing his mind and waiving those rights.[108] In support of this premise, an examination of the case reveals several instances in which Williams indicated a willingness to cooperate with the police.[109] Moreover, Williams reasonably may have believed that he would ultimately have to lead the police to the body.[110]

After concluding that Williams did not waive his right to counsel, the Court appended the following disclaimer: "The Court of Appeals did not hold, nor do we, that under the circumstances of this case Williams *could not*, without notice to counsel, have waived his rights under the Sixth and Fourteenth Amendments. It only held, as we do, that he did not."[111] Although the Court thereby declared that it was not holding that Williams could not have waived his rights, it neither stated nor suggested how he could have done so. The facts of *Brewer*, and the Court's failure to articulate the conditions under which a valid waiver would be found, combine to belie the Court's disclaimer. This residual uncertainty regarding the criteria for determining a valid waiver stands as the principal legacy of *Brewer*.

Despite the fact that the *Brewer* ruling was sustained by a bare majority, it nonetheless may suggest the contours of future decisions on similar issues. In *United States v. Brown*,[112] defendants had been convicted of conspiring to steal merchandise certificates that were part of an interstate shipment. The federal court of appeals held that statements made by a defendant to an FBI agent should have been suppressed because the agent failed to inquire if the defendant had an attorney to represent her. Although the defendant had signed an express written relinquishment of her rights, the absence of her counsel at the time of execution invalidated it. The court, relying on the *Escobedo* "focus" doctrine, stated, "*Escobedo* and *Massiah* represent a broad endorsement by the Supreme Court of the right to have counsel during an interrogation once the investigation has begun to focus on a particular suspect."[113]

The dissent argued that neither *Massiah* nor *Escobedo* should have been dispositive of the case. The FBI had given the well-educated defendant detailed *Miranda* warnings and had obtained a written waiver.

How, the dissenter asked, could the agent have determined in a more precise manner whether the defendant wished to have her attorney present at the questioning? He concluded, "If there can be no waiver under these undisputed facts, there can be no waiver of counsel and all statements made in the absence of counsel are inadmissible."[114]

CONCLUSION

Brewer v. Williams represents the Supreme Court's most recent expression on the matter of the right to counsel. The Court posited that the sixth amendment right to counsel requires more rigid adherence to *Massiah* guidelines than had generally been accorded the right heretofore. What the Court now seems to be saying is that an incriminating statement obtained from a defendant against whom judicial criminal proceedings have been initiated deprives him of his sixth amendment right to have assistance of counsel in the absence of or without notification of his attorney. This decision seems, *in principle*, to have established a rule that an accused cannot effectively waive his right to counsel for purposes of interrogation, in the absence of counsel.

The history of lower court assessments of admissions and confessions has been riddled with inconsistencies and ambivalence. The *Brewer* opinion gives the courts no more definitive a test governing the questioning of a suspect than any earlier Supreme Court case law provided. Indeed, in its movement away from the rights of society as a whole and toward those of the accused, *Brewer* can perhaps be interpreted as a step backward toward an even more constrained atmosphere in which law enforcement must operate. Justice White, dissenting in *Massiah*, indicated that the Supreme Court had far exceeded the intended limits of the constitutional guarantee in that decision. He stated, "The right to counsel has never meant so much before, and its extension in this case requires some further explanation, so far unarticulated by the Court."[115] This comment seems applicable *a fortiori* to the *Brewer v. Williams* decision.

FOOTNOTES

1. 97 S. Ct. 1232 (1977). *Brewer* was concerned with the extent of police interrogation of an individual against whom adversary proceedings have commenced.

2. Twenty-two states, the National District Attorneys' Association, Inc., and Americans for Effective Law Enforcement, Inc., as amici curiae strongly urged the Court to reconsider the *Miranda* decision "in light of other, more viable alternatives now available." Amicus Curiae Brief for the State of Louisiana at 5.

3. 384 U.S. 436 (1966). Since *Miranda* was decided in 1966, considerable confusion has arisen regarding the scope of its constitutional protections. It was anticipated--and hoped--that *Brewer* would serve as the vehicle to sort out the miasma surrounding *Miranda's* fifth amendment protections. This hope, however, did not materialize.

4. > [T]here is no need to review in this case the doctrine of *Miranda v. Arizona, supra,* a doctrine designed to secure the constitutional privilege against compulsory self-incrimination. ... For it is clear that the judgment before us must in any event be affirmed upon the ground that Williams was deprived of a different constitutional right--the right to assistance of counsel.

   97 S. Ct. at 1239 (citation omitted). Thus, the difficult but important question regarding the breadth of fifth amendment protection against self-incrimination when the sixth amendment right to counsel has attached was not addressed in this decision.

5. *Id.*

   > In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

   U.S. CONST. amend VI. The constitutional provisions pertinent to the Court's ruling in *Brewer* are the sixth and fourteenth amendments. In considering constitutional protections, the rights enumerated under most of the amendments to the U.S. Constitution only apply to a person accused of a federal crime in a federal court. Only through the vehicle of the fourteenth amendment can the Supreme Court exercise jurisdiction over the states.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1. *See*, for a general discussion of an accused's right to counsel under the federal constitution, 18 L. Ed. 2d 1420.

6. Mr. Justice Stewart delivered the opinion of the Court, in which Mr. Justice Brennan, Mr. Justice Marshall, Mr. Justice Powell and Mr. Justice Stevens concurred. Mr. Chief Justice Burger, Mr. Justice Blackmun, Mr. Justice Rehnquist and Mr. Justice White dissented.

7. If the majority had examined the totality of the circumstances involved and, most particularly, the voluntariness of the defendant's statements, the conclusion reached would have been that he had effectively waived his rights.

8. 97 S. Ct. at 1242.

9. The Court declined to accept the district court ruling that Williams' statements had been made involuntarily. *Id.* at 1239.

10. 377 U.S. 201 (1964).

11. About an hour and a half after the girl's disappearance from the YMCA gym, Williams, a YCMA resident, was seen carrying a blanket-wrapped bundle through the YMCA lobby. YMCA personnel, who had been searching for the girl, attempted unsuccessfully to stop him after he walked outside. Williams requested and received help from a fourteen year old boy in opening the door of his car, which was parked outside. The boy later testified that he had seen "two white legs in [the bundle] and they were skinny and white." Petitioner's Brief for Certiorari, app. A at 63.

12. *Id.* at 79.

13. 97 S. Ct. at 1236; Petitioner's Brief for Certiorari, app. A at 56, 79-81. Williams asked whether the police had checked for fingerprints in his room and also whether any of his friends had been questioned.

14. Petitioner's Brief for Certiorari, app. A. at 57.

15. This was later referred to as the "Christian burial speech."

> I want to give you something to think about while we're traveling down the road . . . . Number one, I want you to observe the weather conditions; it's raining, it's sleeting, it's freezing, driving is very treacherous, visibility is poor, it's going to be dark early this evening. They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl's body is, that you yourself have only been there once, and if you get snow on top of it you yourself may be unable to find it. And, since we will be going right past the area on the way into Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas Eve and murdered. And I feel we should stop and locate it on the way in rather than waiting until morning and trying to come back after a snow storm and possibly not being able to find it at all. . . . I do not want you to answer me. I don't want to discuss it further. Just think about it as we're riding down the road.

97 S. Ct. at 1236; Petitioner's Brief for Certiorari, app. A at 81.

16. 97 S. Ct. at 1237; Petitioner's Brief for Certiorari, app. A at 84.

17. 287 U.S. 45 (1932).

18. *Id.* at 71.

19. In other words, they must be extended due process of law. *See* Coleman v. Alabama, 399 U.S. 1, 12-13 (Black, J., concurring) (1969).

20. 316 U.S. 455 (1942).

21. 304 U.S. 458 (1938).

22. *Id.* at 468.

23. 372 U.S. 335 (1963).

24. The express holding was that the fourteenth amendment incorporated the protections of the sixth amendment and made them applicable to the states. The sixth amendment right to counsel was deemed a fundamental right essential to a fair trial. *Id.*

25. 377 U.S. 201 (1964). For general criticism and discussion of *Massiah, see* Enker & Elsen, *Counsel for the Suspect: Massiah v. United States and Escobedo v. Illinois,* 49 MINN. L. REV. 47 (1964); Note, 17 BAYLOR L. REV. 448 (1965); Note, *The Coming of Massiah: A Demand for Absolute Right to Counsel,* 52 GEO. L.J. 825 (1964); Note, 78 HARV. L. REV. 217 (1964); Note, 48 MARQ. L. REV. 247 (1964); Note, *The Admissibility of Voluntary Statements Made in Absence of Counsel,* 16 MERCER L. REV. 343 (1964); Note, 19 SW. L.J. 384 (1965); Note, 39 TULANE L. REV. 581 (1965); Note, 26 U. PITT. L. REV. 151 (1964).

26. 377 U.S. at 205 (quoting Powell v. Alabama, 287 U.S. at 57).

27. "[T]he petitioner was denied the basic protections of [the sixth amendment] guarantee when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." 377 U.S. at 206.

28. 378 U.S. 478 (1964).

29. > We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to *focus* on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied "the Assistance of Counsel" in violation of the Sixth Amendment to the Constitution as "made obligatory upon the States by the Fourteenth Amendment," . . . and that no statement elicited by the police during the interrogation may be used against him at a criminal trial.
>
> . . . .
>
> . . . [W]hen the process shifts from investigatory to accusatory--when its *focus* is on the accused and its purpose is to elicit a confession--our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer.

Id. at 490-92 (emphasis added).

30. *Escobedo* extended the right to counsel by applying it *prior* to the levying of formal charges. The interrogation in this case was conducted before the defendant had been judicially charged with the offense. The Court observed, "It would exalt form over substance to make the right to counsel, under these circumstances, depend on whether at the time of the interrogation, the authorities had secured a formal indictment. Petitioner had, for all practical purposes, already been charged with murder." *Id.* at 486.

31. 384 U.S. 436 (1966). *Miranda* was a composite of four representative cases from various jurisdictions in the United States involving situations in which suspects must be afforded constitutional protections by law enforcement officers. "We granted certiorari in these cases . . . in order . . . to give concrete constitutional guidelines for law enforcement agencies and courts to follow." *Id.* at 441-42. For general criticism and discussion of *Miranda*, *see* Elsen & Rosett, *Protections for the Suspect Under Miranda v. Arizona*, 67 COLUM. L. REV. 645 (1967); Graham, *What is "Custodial Interrogation"? California's Anticipatory Application of Miranda v. Arizona*, 14 U.C.L.A.L. REV. 59 (1966); Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 MICH. L. REV. 59 (1966); Rothblatt & Pitler, *Police Interrogation: Warnings and Waivers--Where Do We Go From Here?*, 42 NOTRE DAME LAW. 479 (1967); Younger, *Results of a Survey Conducted in the District Attorney's Office of Los Angeles County Regarding the Effect of the Miranda Decision upon the Prosecution of Felony Cases*, 5 AM. CRIM. L.Q. 32 (1966); Note, 80 HARV. L. REV. 201 (1966); Note, *A Universal Pre-Arraignment Procedure*, 18 HASTINGS L.J. 633 (1967); Note, 43 TENN. L. REV. 472 (1976); *The New Definition: A Fifth Amendment Right to Counsel*, 14 U.C.L.A.L. REV. 604 (1967); Note, 21 VILL. L. REV. 761 (1976).

32. It became necessary under *Miranda* to advise arrestees who need *not* have been advised under *Escobedo*.

> In short, the Court has added *more* to the [*Escobedo*] requirements that the accused is entitled to consult with his lawyer and that he must be given the traditional warning that he may remain silent and that anything that he says may be used against him. . . . Now, the Court fashions a constitutional rule that the police may engage in no custodial interrogation without additionally advising the accused that he has a right under the fifth amendment to the presence of counsel during interrogation and that, if he is without funds, counsel will be furnished him. When at any point during an interrogation the accused seeks affirmatively or impliedly to invoke his rights to silence or counsel, interrogation must be forgone or postponed. The Court further holds that failure to follow the new procedures requires inexorably the exclusion of any statement by the accused, as well as the fruits thereof.

384 U.S. at 500 (Clark, J., dissenting) (citation omitted).

33. It is interesting to note, however, that "focus" was revived recently in United States v. Brown, 551 F.2d 639 (5th Cir. 1977). In this case, the fact that the defendant at the time of her initial interrogation was not in custody and had not yet been charged with a federal offense was regarded as irrelevant. The majority ruled that under *Escobedo* the right to counsel had attached when the federal investigation *focused* on the defendant.

34. > By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. This is what we meant in *Escobedo* when we spoke of an investigation which had focused on an accused.

384 U.S. at 444.

35. > The principles announced today deal with the protection which must be given to the privilege against self-incrimination when the individual is first subjected to police interrogation while in custody at the station or otherwise deprived of his freedom of action in any significant way. . . . Under the system of warnings we delineate today . . . the safeguards to be erected about the privilege must come into play at this point.

Id. at 477.

36. > [The suspect] must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so choses.

Id. at 479.

37. The majority opinion, delivered by Chief Justice Earl Warren, stated: "[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from *custodial interrogation* of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Id.* at 444.

38. > Therefore, the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today . . . . [T]he need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires.

Id. at 469-70.

39. Until recently, *Miranda* was thought to address both the fifth amendment privilege against self-incrimination and the sixth amendment right to counsel. This combined-focus interpretation has not, however, been supported by subsequent Court rulings. *See, e.g.*, Doyle v. Ohio, 426 U.S. 610, 617 (1976); United States v. Mandujano, 425 U.S. 564, 579 (1976); Michigan v. Tucker, 417 U.S. 433, 439-46 (1974); Kastigar v. United States, 406 U.S. 441, 444-47 (1972); In re Gault, 387 U.S. 1 (1967).

40. 406 U.S. 682 (1972).

41. *Id.* at 688.

42. *Id.* In *Kirby*, the Court affirmed the conviction of a robbery defendant who had been subjected to a police lineup prior to the filing of any formal charges against him.

43. United States v. Wade, 388 U.S. 218 (1967) and Gilbert v. California, 388 U.S. 263 (1967) concerned police lineups after the suspects had been arrested and formally charged with crimes. The suspect in *Kirby* had been arrested but no charge had been filed against him, and the Court held that "the *Wade-Gilbert per se* exclusionary rule is not applicable to pre-indictment confrontations." 406 U.S. at 686.

44. 406 U.S. at 690.

45. 475 F.2d 208, 210 (7th Cir. 1973).

46. *Id.* at 210.

47. > I read *Massiah* to bar the admissibility of the statements obtained here since the government had initiated "adversary judicial criminal proceedings" against Durham prior to the time the statements were obtained. . . . [The government] could not, in my opinion, permissibly interview the defendant without advising his counsel.

Id. at 210-11 (citing *Kirby*). *Durham* is of particular interest to this discussion since it was one of the cases upon which the district court in *Brewer* relied to determine that Williams "could not effectively waive his right to counsel for purposes of interrogation in the absence of counsel (or at least notice to his counsel of the interrogation)." Williams v. Brewer, 375 F. Supp. 170, 178 (1974).

48. "That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused." Hopt v. Utah, 110 U.S. 574, 579 (1884). *See also* Lewis v. United States, 146 U.S. 370 (1892); Schwab v. Berggren, 143 U.S. 442 (1892); Ball v. United States, 140 U.S. 118 (1891).

49. The concept of waiver of one's constitutional rights has long been recognized by the courts. "A person may by his acts or omission to act waive a right which he might otherwise have under the Constitution of the United States." Pierce v. Somerset Ry., 171 U.S. 641, 648 (1898). *See* Jennings v. United States, 391 F.2d 512-13 (5th Cir. 1968); United States v. Hayes, 385 F.2d 375, 378 (4th Cir. 1967); Narro v. United States, 370 F.2d 329-30 (5th Cir. 1966); State v. McClelland, 164 N.W.2d 189, 195 (1969); Mullaney v. State, 5 Md. App. 248, 246 A.2d 291, 301 (1968); State v. Bishop, 272 N.C. 283, 296, 158 S.E.2d 511, 520 (1968). *See generally* 21 AM. JUR. 2d §§ 219, 316-17, 357 (1965); 19 AM. JUR. PROOF OF FACTS, ANN., *Waiver of Rights Under Miranda* §§ 1-50, which contains an excellent review of the entire subject.

50. 304 U.S. 458 (1938).

51. > A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon *the particular facts and circumstances surrounding that case*, including the background, experience, and conduct of the accused.

Id. at 464 (emphasis added). For a discussion of the *Johnson* waiver standard, *see* Adams v. United States, 317 U.S. 269, 275 (1942); Waley v. Johnson, 316 U.S. 101, 104 (1942); Glasser v. United States, 315 U.S. 60, 70-71 (1942). *Cf.* United States v. Harden, 480 F.2d 649 (8th Cir. 1973)(which does not rely on *Johnson* but employs the same rationale).

52. 304 U.S. at 464. The *Johnson* standard was rearticulated in *Escobedo* and *Miranda*. *See* notes 28 & 3 *supra*. For a discussion of the "totality-of-circumstances" test, *see* Spano v. New York, 360 U.S. 315, 321-24 (1959); Holloway v. United States, 495 F.2d 835, 837 (10th Cir. 1974); Pettyjohn v. United States, 419 F.2d 651, 655 (D.C. Cir. 1969); People v. Thornhill, 69 Cal. App. 3d 846, 855-56, ___ Cal. Rptr. ___ (1977).

53. > Just as the mere signing of a boilerplate statement to the effect that a defendant is knowingly waiving his rights will not discharge the government's burden, so the mere absence of such a statement will not preclude as a matter of law the possibility of an effective waiver.
>
> . . . .
>
> Thus, we cannot accept appellant's suggestion that because he did not make a statement--written or oral--that he fully understood and voluntarily waived his rights after admittedly receiving the appropriate warnings, his subsequent answers were automatically rendered inadmissible. . . . [A] statement by the defendant to that effect is not an essential link in the chain of proof.

United States v. Hayes, 385 F.2d at 377-78 (4th Cir. 1967). The court in *Hayes* found the defendant's incriminating statements "voluntary" and concluded that he had made a constitutionally

valid waiver. "That he had the presence of mind and the liberty to make a phone call and to demand an attorney shortly after receiving the requisite warnings strongly supports the inference that Hayes understood the warnings and voluntarily relinquished his rights." *Id.* at 378. *Accord,* Hughes v. Swenson, 452 F.2d 866 (8th Cir. 1971); United States v. Hilliker, 436 F.2d 101 (9th Cir. 1971), *cert. denied,* 401 U.S. 958 (1971); United States v. Ganter, 436 F.2d 364 (7th Cir. 1970); United States v. Montos, 421 F.2d 215 (5th Cir. 1970), *cert. denied,* 397 U.S. 1022 (1970); Bond v. United States, 397 F.2d 162 (10th Cir. 1968), *cert. denied,* 393 U.S. 1935 (1969).

54. 495 F.2d 35 (8th Cir. 1974).

55. *Id.* at 36.

56. *Id.* at 37.

57. "If an accused can voluntarily, knowingly, and intelligently waive his right to counsel before one has been appointed, there seems no compelling reason to hold that he may not voluntarily, knowingly, and intelligently waive his right to have counsel present at an interrogation after counsel has been appointed." *Id.*

58. United States v. Zamarripa, 544 F.2d 978 (8th Cir. 1976).

59. *Id.* at 981. *But cf.* United States v. Durham, 475 F.2d 208 (7th Cir. 1973), which held that a valid waiver is impossible once the right to counsel has attached if defendant's counsel is not present or notified. *See* text accompanying note 45 *supra.*

60. The Supreme Court has stated:

> This Court's decisions reflect a frank recognition that the Constitution requires the sacrifice of neither security nor liberty. The Due Process Clause does not mandate that the police forego all questioning, or that they be given carte blanche to extract what they can from a suspect. "The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness."

Schneckloth v. Bustamonte, 412 U.S. 218, 225 (1973)(quoting Culombe v. Connecticut, 367 U.S. 568, 602 (1961)). *See* King v. Warickshall, 168 Eng. Rep. 234-35 (K.B. 1783).

61. *See* notes 22 & 51 and accompanying text *supra.*

62. Separate admonitions were given by the Davenport police when Williams surrendered to them, by a Davenport magistrate who arraigned Williams on the abduction charge, and by Detective Leaming of the Des Moines police prior to transporting Williams back to Des Moines. 97 S. Ct. at 1235-36.

63. *Id.*

64. The record showed that defendant Williams had held two phone conversations with attorney McKnight, one of which defendant initiated. The record also showed that Williams had requested and received three separate private conferences with attorney Kelly in Davenport. These conferences totaled a time period of more than two hours. *Id.* It has been held that an exercise of a known constitutional right is significant evidence in the determination of a valid waiver. *See* United States v. Cobbs, 481 F.2d 196 (3rd Cir. 1973), *cert. denied,* 414 U.S. 980 (1973); United States v. Brown, 459 F.2d 319 (5th Cir. 1972), *cert. denied,* 409 U.S. 864, *reh. denied,* 409 U.S. 1119 (1972).

65. Note, for example, the following exerpt from defendant Williams' testimony at the Suppression of Evidence Hearing, Polk County District Court (Iowa), April 2, 1969:

> Question: Mr. Williams, while you were in Davenport, were you advised of your constitutional rights?
> Answer: Yes.
> Question: Were you first advised of them by Lt. Ackerman? [Davenport police officer]
> Answer: Right.
> Question: Did he make those clear to you?
> Answer: Yes, he did.
> Question: You didn't have any trouble understanding what he was trying to tell you?
> Answer: No.
> Question: And do you recall being taken before Judge Metcalf? [Davenport magistrate who arraigned Williams]
> Answer: Yes.
> Question: And did Judge Metcalf also advise you of these constitutional rights?
> Answer: Yes.
> Question: He made them quite clear to you, did he not?
> Answer: Yes.
> Question: After Captain Leaming arrived in Davenport, that was after lunch you met him; is that right?
> Anwer: Yes.
> Question: Did Captain Leaming advise you of your constitutional rights?
> Answer: This I don't recall, because I can't see any necessity for him to advise me of my rights.
> Question: You had been advised before?
> Answer: Yes.

Petitioner's Brief for Certiorari, app. at 49-51.

66. *See* notes 22 & 51 and accompanying text *supra.*

67. Williams expressly stated that he understood his rights. *See* note 65 *supra*. Further, the Iowa district court ordered Williams to be examined at an Iowa mental health institute, where he was found competent and sane. Petitioner's Brief for Certiorari, app. A at 9.

68. There is no ready definition of voluntariness which can be applied to a particular fact situation. "The notion of 'voluntariness' is itself an amphibian." Culombe v. Connecticut, 367 U.S. at 604-05.

> Except where a person is unconscious or drugged or otherwise lacks capacity for conscious choice, all incriminating statements--even those made under brutal treatment--are "voluntary" in the sense of representing a choice of alternatives. On the other hand, if "voluntariness" incorporates notions of "but-for" cause, the question should be whether the statement would have been made even absent inquiry or other official action. Under such a test, virtually no statement would be voluntary because very few people give incriminating statements in the absence of official action of some kind.

Bator & Vorenberg, *Arrest, Detention, Interrogation and the Right to Counsel: Basic Problems and Possible Legislative Solutions*, 66 COL. L. REV. 62, 72-73 (1966). *See also* 3 WIGMORE, EVIDENCE § 826 (Chadbourn rev. 1970); Child, *The Involuntary Confession and the Right to Due Process: Is a Criminal Defendant Better Protected in the Federal Courts than in Ohio?*, 10 AKRON L. REV. 261, 262-68 (1976); Kurland, *1970 Term: Notes on the Emergence of the Burger Court*, 1971 S. CT. REV. 265, 301-03.

69. Schneckloth v. Bustamonte, 412 U.S. at 226. *See generally* Note, *Developments in the Law: Confessions*, 79 HARV. L. REV. 938, 954-84 (1966). *See also*, for a discussion of psychological coercion, Sulzner, *Custodial Interrogations and the Fifth Amendment--A Passing Shadow?*, 12 CAL. W.L. REV. 512, 521 (1976).

70. *See* text accompanying notes 12-14 *supra*.

71. Holloway v. United States, 495 F.2d 835 (10th Cir. 1974); United States v. Cobbs, 481 F.2d 196 (3rd Cir. 1973), *cert. denied*, 414 U.S. 980 (1973); United States v. Hopkins, 433 F.2d 1041 (5th Cir. 1970), *cert. denied*, 401 U.S. 1013 (1971).

72. 384 U.S. at 478.

73. Although heavily weighted by the majority, close examination of the "speech" reveals no hint whatsoever of coercion, threat, brutality or promise--all cogent factors in a consideration of waiver. It is also significant that at no time during his extensive testimony did Williams ever state that Captain Leaming's statement about a Christian burial for the little girl influenced him to show the police the location of the body. Compare the police interrogation in Haynes v. Washington, 373 U.S. 503 (1963);

Lynumn v. Illinois, 372 U.S. 528 (1963); Rogers v. Richmond, 365 U.S. 534 (1961); Blackburn v. Alabama, 361 U.S. 199 (1960); Spano v. New York, 360 U.S. 315 (1959).

74. 378 U.S. 478 *passim;* 384 U.S. 436 *passim.* For a general discussion of what constitutes custodial interrogation within *Miranda, see* 31 A.L.R.3d 565 (1970).

75. 384 U.S. at 476.

76. A reading of the concurring opinion of Justice White in *Michigan v. Mosley* would suggest that the Court anticipated the replacement of *Miranda* requirements by more flexible police interrogation standards. "I suggest that in the final analysis the majority will adopt voluntariness as the standard by which to judge the waiver of the right to silence by a properly informed defendant." 423 U.S. at 108 (White, J., concurring). For a general discussion of voluntariness, *see* 31 A.L.R.3d 565, 676-80 (1970) and cases cited.

77. 384 U.S. at 436.

78. In its opinion affirming the Iowa trial court's determination of waiver, the Iowa Supreme Court applied the "totality-of-circumstances test for a showing of waiver of constitutionally-protected rights in the absence of an express waiver," and concluded

> that evidence of the time element involved on the trip, the general circumstances of it, and the absence of any request or expressed desire for the aid of counsel before or at the time of giving information, were sufficient to sustain a conclusion that defendant did waive his constitutional rights as alleged.

State v. Williams, 182 N.W.2d 396, 401-02 (1972).

79. The federal courts all relied on the *Johnson v. Zerbst* waiver test, which states that it is incumbent upon the State to prove an "intentional relinquishment or abandonment of a known right or privilege." 304 U.S. at 464. The Supreme Court apparently interpreted this standard as requiring an express manifestation by the defendant before there can be a valid waiver of counsel.

80. Williams v. Brewer, 375 F. Supp. 170, 182 (1974).

81. *Id.* at 178 (citations omitted)(emphasis added). Among other cases, the district court based this statement on *Durham, supra* note 45, which had grounded its ruling on an interpretation of *Massiah* to preclude a defendant's waiver of the right to counsel in the absence of counsel after judicial proceedings have been initiated.

82. > A review of the record here . . . discloses no facts to support the conclusion of the state court that [Williams] had waived his constitutional rights other than that [he] had made incriminating statements. . . . The District Court here properly concluded that an incorrect constitutional standard had been applied by the state court in determining the issue of waiver.
> Further, the resolution of the waiver issue by the state court . . . cannot be accepted as binding when it has misconceived a federal constitutional right.

Williams v. Brewer, 509 F.2d 227, 233 (8th Cir. 1974)(citations omitted).

83. 97 S. Ct. at 1242, citing Brown v. Allen, 344 U.S. 443, 507 (1953).

84. 384 U.S. at 444.

85. *Id.* at 475.

86. *See* note 53 *supra*.

87. *See* note 27 *supra*.

88. 97 S. Ct. at 1240-41.

89. "The Court apparently perceives the function of the exclusionary rule to be so different in these varying contexts that it must be mechanically and uncritically applied in all cases arising outside the Fourth Amendment." *Id.* at 1251 (Burger, C.J., dissenting).

90. The *Massiah* opinion, delivered by Justice Stewart (who also wrote the *Brewer* opinion), stated, "In this case, Massiah was more seriously imposed upon . . . because he did not even know that he was under interrogation by a government agent." 377 U.S. at 206.

91. *Massiah* involved a defendant, indicted on a federal narcotics charge, who had made incriminating statements to a co-defendant while he was free on bail. The statements were heard by a federal agent over a radio transmitter that had been placed on the co-defendant. In this case, surreptitious means were employed in listening to the statements, and thus the unwary defendant had *no opportunity* to avail himself of guaranteed constitutional protections. In *Brewer*, the defendant had been formally given the *Miranda* admonishment on at least three occasions, had invoked his right to counsel several times, and was fully cognizant of the presence of police officers and his constitutional safeguards at the time he conversed with the officers.

92. Trickery was employed to elicit the culpatory statements and admissions in *Massiah*, but "[t]hat the incriminating statements were elicited surreptitiously in the *Massiah* case, and otherwise here, is constitutionally irrelevant." 97 S. Ct. at 1240.

93. *Id.*

94. *Id.* at 1240 n.8.

95. *Id.*

96. 377 U.S. at 208 (White, J., dissenting)(emphasis added). Justice White also filed a dissenting opinion in *Brewer*.

97. Before an accusatory pleading is filed, police officers may be able to satisfy the court that a defendant has waived his rights, but after an accusatory instrument has been filed, it may be impossible to satisfy that requirement. *See* Mathies v. United States, 374 F.2d 312 (D.C. Cir. 1967), wherein (now) Chief Justice Burger stated that "[t]he prospective application of *Miranda* . . . plainly will require that such [in-custody] interviews can be conducted only after counsel has been given an opportunity to be present. 374 F.2d at 315 n.3. *Accord,* People v. Isby, 267 Cal. App. 2d 484 (1968), where the court concluded that since a defendant was entitled to the effective aid of counsel at any interrogation initiated by law enforcement officers after he was charged, any incriminatory statements obtained without such aid of counsel and their admission in evidence were constitutionally invalid. *Id.* at 495. In ruling on *Isby*, the California court of appeal cited People v. Brice, 239 Cal. App. 2d 181 (1966), as applicable to determination of the admissibility of incriminating statements secured after indictment in the absence of defendant's counsel. *Id.* at 191. In addition to relying on *Brice,* the court noted a long line of New York cases that had established a criminal defendant's absolute right to the presence of counsel following commencement of a criminal proceeding, notwithstanding any voluntary and uncoerced confession or admission, or a "waiver" of his right to counsel, *e.g.*, People v. Vella, 287 N.Y.S.2d 369 (1967); People v. Donovan, 243 N.Y.S. 2d 841 (1963); People v. Rodriguez, 229 N.Y.S.2d 353 (1962); People v. Meyer, 227 N.Y.S.2d 427 (1962); People v. Waterman, 216 N.Y.S.2d 70 (1961); People v. DiBiasi, 200 N.Y.S.2d 21 (1960). *But cf.* Moore v. Wolff, 495 F.2d 35 (8th Cir. 1974); United States v. Springer, 460 F.2d 1344 (7th Cir. 1972), *cert. denied,* 409 U.S. 873 (1973); United States v. Crisp, 435 F.2d 354 (7th Cir. 1971), *cert. denied,* 402 U.S. 947 (1971); United States v. Garcia, 377 F.2d 321 (2d Cir. 1967); Stowers v. United States, 351 F.2d 301 (9th Cir. 1965), where the court held that a valid waiver can be made in the absence of counsel, after counsel has been retained.

98. Since *Massiah* does not involve a specific advisement to a charged suspect of his rights, there is nothing he can "waive".

99. 97 S. Ct. at 1254. Stone v. Powell, 96 S. Ct. 3037, 3052 (1976), held that a state prisoner may not be granted federal habeas corpus relief of a fourth amendment claim absent a showing that he was denied an opportunity for a full and fair litigation of that claim at his trial.

100. 97 S. Ct. at 1254 (Burger, C.J., dissenting). *Accord,* Michigan v. Tucker, 417 U.S. 433 (1974).

> Just as the law does not require that a defendant receive a perfect trial, only a fair one, it cannot realistically require that policemen investigating serious crimes make no errors whatsoever. The pressures of law enforcement and the vagaries of human nature would make such an expectation unrealistic. Before we penalize police error, therefore, we must consider whether the sanction serves a valid and useful purpose.

Id. at 446. For a discussion of in-custody questioning of persons suspected of crime, *see* Schaefer, *Police Interrogation and the Privilege Against Self-Incrimination,* 61 NW. U.L. REV. 506 (1966); Coakley, *Law and Police Practice: Restrictions in the Law of Arrest,* 52 NW. U.L. REV. 1 (1957).

101. 97 S. Ct. at 1247. *Stone* has been the subject of much commentary. For general criticism and discussion of *Stone, see* Note, 41 ALBANY L. REV. 172 (1977); Note, HARV. J. LEGIS. 152 (1976); Note, *The Fourth Amendment Exclusionary Rule in Federal Habeas Corpus,* 37 LA. L. REV. 289 (1976); Note, *Limitation Placed on Federal Habeas Corpus Jurisdiction in Fourth Amendment Cases--A Further Erosion of the Exclusionary Rule,* 22 LOYOLA L. REV. 856 (1976); Note, 48 MISS. L.J. 155 (1977); Note 42 MO. L. REV. 127 (1977); Note, *The Unpredictable Writ--The Evolution of Habeas Corpus,* 4 PEPPERDINE L. REV. 313 (1977); Note, *Federal Habeas Corpus Relief is Barred for State Prisoners' Fourth Amendment Claims,* 8 TEX. TECH. L. REV. 446 (1976); Note, *Habeas Corpus: A New Look at Fourth Amendment Claims,* 16 WASHBURN L.J. 528 (1977).

102. 28 U.S.C. § 2254(d) (1970). The congressional intent behind this statute was to preclude the setting aside of a state finding of fact without convincing evidence to do so, since the state court, which hears the witness testify, is best able to interpret the testimony and resolve questions as to its credibility. *See* In Re Parker, 423 F.2d 1021, 1024 (8th Cir. 1970).

103. Townsend v. Sain, 372 U.S. 293, 318 (1963).

104. 97 S. Ct. at 1238 (emphasis added). The federal district court, ruling on discrepancies between the testimony of Davenport attorney Kelly and Captain Leaming, concluded that Captain Leaming had denied a request by attorney Kelly to ride back to Des Moines with Williams and also determined that attorney Kelly had told Captain Leaming that Williams was not to be questioned until he arrived in Des Moines.

105. "If federal courts are hereafter allowed to resolve facts in a similar fashion, there will be little purpose in having an original adjudication of federal rights in the state courts." Petitioner's Brief at 69 (citing Wright & Sofaer, *Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility,* 75 YALE L.J. 895, 920-22 (1966)).

106. 97 S. Ct. at 1235-36, 1240 n.8, 1242.

107. The test for waiver as articulated and applied in the Court's ruling on *Brewer* perceptibly eroded the personal character of constitutionally protected rights and privileges. The decision reached by the Court in effect shifted control of the constitutional right to counsel from the hands of the accused into those of the attorney. While the majority placed much importance on the "agreement" assertedly made between the police and defense counsel in *Brewer,* the breach of that purported agreement simply reflected questionable police conduct. In no way could such an agreement preclude the defendant from waiving his constitutional rights. *See* Brookhart v. Janis, 384 U.S. 1 (1966). The right to counsel belongs to the defendant, not to his attorney. The sixth amendment right is inherently a personal one, and one that only the accused can waive. The sixth amendment guarantees that "in all criminal prosecutions, *the accused shall enjoy the right* . . . to have the assistance of counsel for his defense." (emphasis added). "[The Court's holding] denies that the rights to counsel and silence are personal, nondelegable, and subject to a waiver only by that individual." 97 S. Ct. at 1249 (Burger, C.J., dissenting). Chief Justice Burger, writing an outspoken dissenting opinion, took strenous issue with the consistency of the *Brewer* holding on this issue:

> One plausible but unarticulated basis for the result reached is that once a suspect has asserted his right not to talk without the presence of an attorney, it becomes legally impossible for him to waive that right until he has seen an attorney. But constitutional rights are *personal,* and an otherwise valid waiver should not be brushed aside by judges simply because an attorney was not present. The Court's holding operates to "imprison a man in his privileges." . . . It inclusively presumes a suspect is legally incompetent to change his mind and tell the truth until an attorney is present.

Id. (citations omitted)(emphasis in the original). The Chief Justice expressly faulted the majority's finding that "[T]he circumstances of record in this case thus provide no reasonable basis for finding that Williams waived his right to the assistance of counsel." *Id.* at 1243. "And the record is replete with evidence that Williams knew precisely what he was doing when he guided the police to the body." *Id.* at 1250. The right to counsel assures a defendant that counsel will be available if he so desires. However, circumstances may be such or a situation may arise wherein a defendant may decide that he does not want to be represented by counsel. It is in such a situation that the right *not* to have counsel becomes important. Does the court have

the absolute power to force an accused to be assisted by counsel even if, after being made fully aware of his constitutional rights, he chooses to waive them? Some court opinions have so held. *See generally* United States v. Durham, *supra* note 45; United States *ex rel.* Chabonian v. Liek, 366 F. Supp. 72 (E.D. Wis. 1973).

108. "There is no reason . . . to rob the accused of the choice to answer questions voluntarily for some unspecified period of time following his own previous contrary decision." Michigan v. Mosley, 423 U.S. at 111 (White, J., concurring). *See* United States v. Grant, 549 F.2d 942 (4th Cir., 1977); Biddy v. Diamond, 516 F.2d 118 (5th Cir. 1975); United States v. Cavallino, 498 F.2d 1200 (5th Cir. 1974). It is also possible that Williams' admission was triggered by the urge to relieve himself of the immense burden of guilt he was carrying. The compulsion to confess is scarcely a form of conduct lacking in precedent. "The human urge to confess wrongdoing is, of course, normal in all save hardened, professional criminals, as psychiatrists and analysts have demonstrated." 97 S. Ct. at 1250 (Burger, C.J., dissenting)(citation omitted). *See also* 3 WIGMORE, EVIDENCE § 840 (Chadbourn rev. 1970).

109. Williams voluntarily surrendered after speaking with his attorney on the telephone, and, after initiating a conversation concerning the police investigation being conducted, Williams spontaneously asked whether the shoes of the young girl and the blanket had been found. 97 S. Ct. at 1235.

110. Attorney McKnight advised his client:

> You have to tell the officers where the body is. . . . You have got to tell them where she is. . . . It makes no difference, you have got to tell them, you have already been on national hook-up. . . . What do I mean by national hook-up? . . . I mean you have been on television nationally, so that makes no difference. You have got to tell them where she is. . . . It makes no difference anyway. When you get back here, you tell me and I'll tell them. I'm going to tell them the whole story.

(Exerpts from testimony of Captain Leaming, who, with the Des Moines Chief of Police, was present at a telephone conversation December 26, 1968, between attorney McKnight and defendant Williams. Only McKnight's end of the conversation is in the record.) Petitioner's Brief for Certiorari, app. A at 96.

111. 97 S. Ct. at 1243 (emphasis in the original).

112. 551 F.2d 639 (5th Cir. 1977).

113. *Id.* at 643 (citation omitted).

114. *Id.* at 647-48. Defendant Brown expressly waived, the only thing that Williams didn't do, and the court, also relying on *Massiah,* found the waiver inadequate.

115. 377 U.S. at 209 (White, J., dissenting)(citations omitted). For additional criticism and discussion of *Brewer, see* Tochterman, *The Christian Burial Speech,* PROSECUTOR'S BRIEF, August 1977 at 21; Wren, *Miranda Years: Another Decade?,* TRIAL, July 1977 at 45; Note, 63 A.B.A.J. 686 (1977); Note, 21 CRIM. L. REP. 4135 (1977); *Inside the Burger Court,* NEWSWEEK, June 13, 1977, at 102; Note, *Constitutional Law: No Clear Standard for the Waiver of an Asserted Right to Counsel,* 29 U. FLA. L. REV. 778 (1977); Will, *A Distorted Sense of Justice,* The Wash. Post, Mar. 27, 1977 at C7; *The Court and Basic Rights,* The Wash. Post, Mar. 26, 1977 at A18.